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No. 03-1107

Supreme Court, U.S.
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In The

Supreme Court of the United States

CENTER FOR FAIR PUBLIC POLICY, *et al.*,

Petitioners,

vs.

MARICOPA COUNTY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), does Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), constitute the holding of the Court in that case?

2. Did the court of appeals err in holding that Justice Kennedy's *Alameda Books* "proportionality" requirement for content-*based* time, place and manner restrictions contained no different elements and was not more speech-protective than the *Alameda* plurality's construction of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)?

3. Did the court of appeals err in alternatively holding that Justice Kennedy, in *Alameda*, intended to create a unique "proportionality" test applicable only to content-based "*place*" restrictions of expression, but inapplicable to content-based "*time*" or "*manner*" restrictions?

4. Did the court of appeals misstate this Court's ruling in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), by holding that the "narrow tailoring" requirement for "time, place and manner" restrictions is satisfied merely "so long as the government's asserted interest would be achieved less effectively absent the regulation," without *at least* the additional requirement from *Ward* that "the means chosen are not substantially broader than necessary to achieve the government's interest," thus adopting a new "narrow tailoring" test which is neither "narrow" nor "tailored," and which imposes no effective limits whatsoever on legislative power to restrict the operation of expressive businesses?

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Petitioners Center For Fair Public Policy and Dream Palace (hereafter "petitioners") submit this Reply solely to bring to the Court's attention certain inaccuracies which appear in the Brief in Opposition filed herein.

(1) At p. 8 of the Brief in Opposition, respondents significantly misrepresented the position taken by petitioners in the Court of Appeals by stating:

> Petitioners here told the Ninth Circuit that *Alameda Books* constitutes a "sea change" in First Amendment law. They suggested the *Renton* framework no longer applies to time, place and manner cases, and that courts must apply strict scrutiny whenever they measure the constitutionality of sexually-oriented-business regulations.

This statement is inaccurate in multiple respects. First, neither before nor since this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), have petitioners ever stated or even suggested (either in this Court or the court of appeals) that all sexually oriented business regulations are subject to strict scrutiny. Indeed, it is petitioners' position that such cases are extremely rare, and, unlike the present case, occur only when there is either a *direct* restraint on expression, or an indirect restraint coupled with definitive proof of a content-based purpose or intent. Moreover, merely because restrictions aimed primarily at adult businesses are now recognized as "content-based" rather than "content-neutral," neither petitioners nor any member of this Court has suggested that, *ipso facto*, such restrictions are therefore subject to strict scrutiny.

Second, petitioners' briefing in the court of appeals *affirmatively stated* that they were not seeking review under strict scrutiny. Petitioners maintained that, under Justice Kennedy's concurrence in *Alameda*, such restrictions are subject only to a "heightened" standard of *intermediate* scrutiny. *See* p. 16 of the Supplemental Brief of Appellants Center For Fair Public Policy filed in the Court of Appeals on or about October 3, 2002, where petitioners made their position on this issue extremely clear:

> Though he [Justice Kennedy] did not impose a test of *strict* judicial scrutiny, he nonetheless imposed a *heightened* intermediate scrutiny requirement far more demanding than the traditional time, place and manner test. (All emphases in original.)

(2) At pp. 10-11 of the Brief in Opposition, respondents again mischaracterized the position taken by petitioners:

> Petitioners claim . . . the Ninth Circuit erred in concluding that Justice Kennedy did not intend "proportionality" to invalidate every time, place and manner regulation.

In essence, respondents state that petitioners' claim herein is that Justice Kennedy's proportionality test compels invalidation of every time, place and manner regulation. Petitioners have made no such claim, and nothing in the certiorari petition filed herein, nor any of the briefing filed below, supports such a distortion of petitioners' position. In fact, the certiorari petition is entirely inconsistent with such a position for at least two distinct reasons. First, petitioners have at all times maintained that Justice Kennedy's opinion articulates a new "proportionality" requirement that only applies to content-*based* time, place and manner restrictions. Accordingly, it would leave content-*neutral* time place and manner restrictions –

like that at issue in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) – wholly unaffected.

Second, the certiorari petition made clear that even if a case involved a content-*based* time, place or manner regulation and Justice Kennedy's proportionality requirement were applied, its mere application would by no means be outcome-determinative. *See, e.g., G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003), prominently discussed in the certiorari petition herein at p. 14 for the proposition that Justice Kennedy's proportionality test was fully and fairly applied, and the ordinances there challenged nonetheless easily satisfied its requirements.

(3) At p. 13 of the Brief in Opposition, respondents misstate petitioners' position with respect to this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), stating that it is "petitioners' contention in this case that *Renton* is no longer good law." That is most assuredly *not* petitioners' position. As Justice Kennedy himself made clear, once government demonstrates that a content-based time, place and manner restriction meets the requirements of Justice Kennedy's threshold "proportionality test," the traditional *Renton* test is then applied in making a final determination as to the validity of the challenged provision.

Respectfully submitted,

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